85-1436

Supreme Court, U.S.
FILED
FEB 18 1986
JOSEPH F. SPANIOL, JR.
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NO.

in the Supreme Court of the United States

JOSE LUIS ACOSTA,
DRADEN PADGETT, JR.
JOSEPH BROWN, and ODIS McMULLEN
Petitioners

vs.

UNITED STATES OF AMERICA
Respondent

PETITION FOR WRIT OF CERTIORARI TO THE ELEVENTH CIRCUIT COURT OF APPEALS

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QUESTION PRESENTED

Whether the defendants were denied their constitutional right to confrontation when the trial court prevented access to the chief government witness's tax returns and financial information.

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Petitioners pray that a Writ of Certiorari be issued to review the judgment of the United States Court of Appeals for the Eleventh Circuit entered on August 12, 1985, rehearing January 8, 1986.

OPINION BELOW

The opinion of the United States Court of Appeals for the Eleventh Circuit is not published and is printed in the Appendix.

JURISDICTION

The judgment and opinion of the United States Court of Appeals for the Eleventh Circuit was entered on August 12, 1985, rehearing denied January 8, 1986. The jurisdiction of this court is invoked under 28 U.S.C. §1254.

STATEMENT OF THE CASE

The defendants, Jose Acosta, Joseph Brown, Draden Padgett, Jr., and Odis McMullen, along with numerous codefendants, were charged with having violated the drug laws of the United States through conspiracy, importation, and possession with intent to distribute marijuana. In addition, Jose Acosta was charged with Continuing Criminal Enterprise (C.C.E.) and with racketeering (RICO). Defendants Joseph Brown and Draden Padgett, Jr. were charged with filing false income tax returns.

After a trial by jury, guilty verdicts were returned against Jose Acosta on all counts except Counts 18 and 19; against Joseph Brown on all counts except Counts 18 and 19; against Draden Padgett, Jr. on all counts; and against Odis McMullen on all counts except Counts 16 through 19.

Based thereupon, Jose Acosta was sentenced to a combination of concurrent terms totaling 60 years incarceration and a $100,000 fine. Joseph Brown and Draden Padgett, Jr. were sentenced to a combination of concurrent and consecutive terms totaling 40 years incarceration and a $200,000 fine. Odis McMullen was sentenced to a combination of concurrent and consecutive terms totaling 12 years and a $15,000 fine.

On appeal to the Eleventh Circuit Court of Appeals, petitioners' convictions were affirmed. On rehearing, petitioner Draden Padgett, Jr.'s convictions and sentences on Counts 24 and 25 were vacated, and Petitioner Jose Luis Acosta's convictions and sentences on Counts 2 and 3 were vacated. All remaining convictions and sentences having been affirmed, this Petition for Writ of Certiorari in the United States Supreme Court follows.

STATEMENT OF THE FACTS

The chronology of the Cobb marijuana trafficking conspiracy began in 1977 when Clyde Walton Cobb awoke to discover a disabled truck-trailer full of marijuana across the street from his house. Cobb assisted Jose Acosta with the unloading of the truck and agreed to provide temporary storage. Thereafter, Cobb agreed to act as a salesman for that and future loads.

In September, 1977, Cobb requested that his brother-in-law, Daniel Abbey, join the conspiracy. However, it was not until December, 1977 that Abbey agreed to join, first as an unloader, and thereafter as a bookkeeper responsible for the collection of monies. In that month, Cobb, Abbey and Acosta were involved in the transfer of marijuana from one van to the trucks of Carlton Reeves and James Sellers, who transported it to the Cottondale Farm.

Thereafter, Acosta requested that Cobb locate a new hole or offload site. After Sellers and Reeves discovered the Rock Pile in Northern Florida, this secluded location was viewed by Cobb, Acosta, Tony Bascaro and Luis Bosch, and approved for use.

On December 29, 1977, Acosta, Abbey, Cobb and Charlie Brake observed the "Tanila" enter the inlet to the Rock Pile from their vantage point at the Ramada Inn. The "Tanila" was offloaded by Acosta, Bascaro, Bosch and others, and weight slips were prepared and maintained by Abbey. The marijuana was then trucked by Reeves, Sellers, and others, to the Cottondale Farm in Jackson County. The purchase money was collected and delivered by Abbey to Acosta's house in Carol City.

While exiting the bay, the "Tanila" hit a bridge and was seized by authorities. The crew, consisting of Alfonso, Castro and Green, was arrested.

At Acosta's request, Reeves and Sellers located a new hole or offload site. On January 31, 1978, the "Navigator" was offloaded at the Eglin Air Force Base. Acosta was present, directing Carl Hughes to unload the "Navigator" hold. The marijuana was trucked by Sellers, Reeves, Francis Marquis, and others, to the Cottondale Farm, where it was unloaded by various persons, including Guriak. After the "Navigator" ran aground and was seized by authorities, the purchase money was collected and delivered to Acosta's house.

In February, 1978, Sellers and Reeves were requested to locate a new hold, and discovered the Aucilla River Fishcamp. In surveilling the area, Sellers and Reeves were approached by Joseph Brown and Draden Padgett, Jr., who suggested that they could supply an offloading crew for $160,000 per load; payment being due upon completion of the offloading. The site and offer were approved by Acosta.

On March 1, 1978, a successful offloading was conducted at the Aucilla River Fishcamp by Brown, Padgett, Jr., and Odis McMullen in the presence of Acosta. The marijuana was trucked by Vernon Mattson, Marquis, and others, to the farm in Madison County where it was unloaded by various individuals, including Guriak. The collected purchase monies were delivered to Acosta's house.

On March 15, 1978, a second shipment was successfully offloaded at the Aucilla River Fishcamp and taken to the Madison farm.

On April 1, 1978, Reeves, Sellers, Brown, McMullen, Acosta, Bascaro, Padgett, Jr., and others were present and involved in the offloading of the "Miss Too Nicey". Acosta supervised at both the vessel and the farm. Carl McCardle and James Bailey acted as surveillance radio men; Brown ran an offload boat; and Theodore Manning drove one of the trucks. The marijuana was taken to the Madison farm and unloaded by Guriak, Alfred Vadney, and others. The purchasers money was collected and taken to Acosta's house by Bailey.

In April, 1978, after Abbey had delivered the marijuana profits to Cobb at his Golden Beach house, Cobb was robbed by individuals posing as law enforcement officers. The thieves were arrested and the money recovered. Half of the money was confiscated by the Internal Revenue Service, and Cobb ultimately agreed to the RICO forfeiture of the remaining monies.

In late April, 1978, defendant Guriak and others successfully offloaded a shrimp boat at the Aucilla River Fishcamp. John Janes helped load the trucks which were driven by Marquis, Manning, Mattson and others to a warehouse in Tallahassee. Residue was discovered by law enforcement officers in one of the trucks leaving the warehouse. A raid of the facility disclosed marijuana. Agents also seized drug-related records from Pat Waldrop. Said records were identical to those which were later to be found in one of Cobb's private planes. The purchase money was delivered by Manning to Acosta's house in Carol City.

A meeting was then held between Cobb, Acosta, Brown, Padgett, Jr., and McMullen, wherein the offloading crew requested an increase of fees. Upon Acosta's refusal to pay any additional sums, Padgett, Jr. and McMullen terminated their involvement in the conspiracy.

After law enforcement surveillance officers were chased off the Madison farm by Reeves, the storage facility was abandoned. A new site in Gadsden County was located.

In July, 1978, the Cobb organization successfully offloaded another shrimp boat at the Aucilla River Fishcamp. Marquis, Janes, and others trucked the marijuana to the new farm at Quincy, in Gadsden County, where it was unloaded by Vadney and others.

At this time, simultaneous surveillance was being conducted by law enforcement authorities at the Gadsden County farm, the Ramada Inn, the Dutch Kitchen Motel, and at an agricultural weigh station stop. The evidence presented at trial and at the Motion to Suppress revealed that two Cubans were arrested at 5:30 a.m. transporting marijuana through an agricultural weigh station. One of these individuals, Joe Ferrer, told authorities that he had met his contact at the Ramada Inn in Tallahassee, and that said contact was driving a black and burgundy Mercedes. A review of the telephone toll records at the hotel revealed that Acosta and Bosch had called several of the same phone numbers in Miami as had Ferrer.

While the officers were reviewing the hotel phone records, Acosta and Bosch checked out of the Ramada Inn and were followed to the Dutch Kitchen Motel. A search of Acosta's room at the Ramada Inn revealed a

McDonald's bag, upon which was written the name of the arrested Cuban, Joe Ferrer.

On July 22, 1978, an orange Vega arrived at the Dutch Kitchen Motel. The driver was observed carrying a full bag into Acosta's room and leaving with an empty bag. Trial evidence later revealed that the driver of the orange Vega was Vadney, who had delivered marijuana money to Acosta. The orange Vega was thereafter followed to the Gadsden barn. A stop of the Vega revealed marijuana residue. A search warrant for the barn was obtained, and marijuana discovered.

Without first attempting to obtain a warrant either for the arrests of Acosta and Bosch or for the search of their room and car, officers attempted to gain entry to the motel room by announcing their identity as members of the cleaning crew. When this rouse did not work, the police announced themselves and arrested the occupants. A search of Acosta's room revealed money in an open bag in an open closet, and drug-related documents on a bureau. A search of Acosta's Mercedes in the parking lot of the Dutch Kitchen Motel revealed notebooks, bale lists and other drug-related documents in the trunk. After standing was conceded, Acosta's Motion to Suppress was denied.

Also in July, 1978, the "Captain Otis II" and the "Geechee Boy II" were to offload at the Aucilla River Fishcamp. The vessels were directed to return to Key West without offloading, where they were seized by the United States Coast Guard and marijuana was discovered.

In the Fall of 1978, the Cobb organization attempted to move its base of operation out of Florida. For example, attempts to offload in Savannah were twice thwarted by law enforcement officials.

In addition, Brown, Reeves, Sellers, Bailey, and Donald Crump located a hole in South Carolina, and built a barn thereon. Due to the amount of law enforcement activity in the area, the site was abandoned without having been used.

On January 15, 1979, a DC-3 loaded with marijuana was seized in Fort Lauderdale, Florida. When the pilot, James McDonnell, became involved with a Constellation aircraft, a beeper or transponder was secreted on the plane by United States Customs.

James McDonnell was approached by Vic Simeone and agreed to fly the Constellation from Miami to Colombia. Upon re-entering the United States air space, the Constellation was followed to North Florida by Customs aircraft. Due to mechanical difficulties and low ground fog, the Constellation was unable to land at the designated landing point. Rather, it attempted to land at the Panama City Airport, where it ran off the runway, and got stuck in the mud. McDonnell, Charles Mora, and Dennis Flynn were arrested. Although not arrested, the awaiting offloading crew consisted in part of Reeves, Brown, Bailey, Mattson and Crump; Acosta was not involved.

At some time between April, 1979 and July, 1979, Cobb, Acosta, Brown, Padgett, Jr., and McMullen successfully offloaded the "Carol B" and the "Miss Susan" at the fishcamp. In late 1980, Acosta, Brown,

McMullen and Cobb were involved with a successful offload in the Florida Keys. And on February 26, 1981, Acosta, Brown and Cobb attempted to import marijuana on the "Miss Sunbury". Upon the "Miss Sunbury"'s being seized by officials, the crew, consisting of Eric Hobwittle, Sergio Perez, Pedro Suden, and Jose Rodriguez, was arrested.

After evidence was presented against Brown and Padgett, on tax counts, the Government rested. Defendants' motions for judgment of acquittal were denied. The Jury was instructed per the charge conference; defendants' objections and requests were denied.

Guilty verdicts were returned and sentences imposed as previously noted. Petitioners' convictions and sentences were affirmed by the United States Court of Appeals for the Eleventh Circuit with the following exceptions: As to Petitioner Draden Padgett, Jr., convictions and sentences on Counts 24 and 25 were vacated; as to Petitioner Jose Luis Acosta, convictions and sentences on Counts 2 and 3 were vacated. This Petition for Writ of Certiorari to the United States Supreme Court follows.

ARGUMENT

THE DEFENDANTS WERE DENIED THEIR CONSTITUTIONAL RIGHT OF CONFRONTATION WHEN THE TRIAL COURT PREVENTED ACCESS TO THE CHIEF GOVERNMENT WITNESS'S TAX RETURNS AND FINANCIAL INFORMATION.

1. Cobb's Evasive Testimony Concerning His Financial Affairs Necessitated Acosta's Access To Records And Witnesses.

It was the defendants' position at trial that the chief government witness, Bill Cobb, was entitled as part of his plea bargain with the government, to retain substantial marijuana profits. It was in part for this reason that the defendants sought information from Cobb as to his financial and IRS records.

Cobb was evasive about his assets and those of his family. He stated that, "I do not own anything". When asked about real estate in his wife's name, he testified, "I don't know all the real estate that my wife holds", although at the time they had been married three years. When asked whether his wife held any property in trust which had been purchased by him, Cobb responded, "I have no trusts, sir". When asked whether his wife owned any assets whatsoever that Cobb had paid for, Cobb responded by questioning whether his wife was on trial. When asked the question by the judge, Cobb replied, "I can't answer that question". When counsel asked whether Cobb's wife owned any stocks, bonds, trust certificates or certificates of deposit

which he had purchased for her, the government objected on the grounds that the question had been asked and answered. The Court sustained the objection.

Cobb's opaque answers pervaded his responses to questions concerning his earnings from the drug business and his financial condition. Since Cobb testified that his agreement with the government permitted him to retain assets acquired before approximately January 1, 1977, Cobb was asked what his approximate net worth was on that date. He stated that he could not even estimate the figure: "I told you, I refuse to guess". Cobb could not remember whether he had ever informed the IRS what his net worth had been prior to entering the drug business.

When asked whether his lawyers and accountant would have records of his income, expenses and net worth from January 1, 1977 through December 31, 1981, he replied that the IRS did a criminal investigation on him from 1976 until 1981 and that he had received a letter from the Service advising him that, "they could find no wrongdoing in any of my tax proceedings and were ready to drop the case". Cobb, although he repeatedly testified that he owned nothing and was a pauper, stated that he did not know his present net worth because he didn't have a financial statement. When asked to estimate his present net worth, he replied, "I refuse to guess that for you, sir". When asked again whether he had an estimate of his present net worth, he answered, "If I did, I wouldn't give it to you, sir".

Cobb further testified that he never told the government the amount of money he had made from smuggling. He acknowledged, however, that the government "told me what I had made and where it was at . . . I saw the figures, I agreed to them, and that was it." When asked what the agents had shown him, Cobb replied, "I don't remember offhand, sir". Similarly, he couldn't recall who had shown him the figures he had been testifying about. When asked to give the jury an idea whether he had made less than ten million dollars from his smuggling, Cobb replied, "I told you I couldn't give you an idea, sir". However, he stated that he had reported and paid taxes on all of the money he had made from smuggling.

2. Petitioners Were Entitled To Production Of The Tax Information.

Petitioners proposed to prove that Cobb was in reality the leader of this conspiracy and that, in return for a "sweetheart" plea bargain, Cobb would falsely swear as to the involvement of each defendant. To prove this line of defense, the Petitioners needed Cobb's tax returns and related documents, which, if honestly prepared, would show the huge amounts of money which Cobb had made from marijuana smuggling. By Cobb's own admission at trial, Cobb had made a considerable fortune from his involvement in the marijuana trade. His returns would, if honestly prepared, show how large that fortune was and help guide the jury in deciding Cobb's actual position in the conspiracy.

Alternatively, if these documents were not honestly prepared and showed little or no income from his illicit activities, Cobb's motivation to falsely implicate the

Petitioners would be apparent to the Jury. By his testimony, Cobb had received considerable income from his illegal ventures. If his returns did not reflect this income, his retention of thse concealed assets and exposure to tax fraud charges would be a powerful inducement for Cobb to please the government.

At the earlier related Sunburn I trial, the district court recognized the significance of these documents and ordered that they be turned over to the defense. The prosecutors simply refused to comply with the court's order.

At Petitioners' trial, the district court, apparently forgetting its earlier ruling, refused at every juncture to order the disclosure of these documents. The court denied requests for production under the Jencks Act, 18 U.S.C. §3500 and, alternatively, the authority of *Brady v. Maryland*, 373 U.S. 83 (1963). Counsel then subpoenaed these records from the Internal Revenue Service and from Cobb's accountant and attorneys. The basis for the court's denial of access to these documents seemed to change at every juncture. Primarily, the court was of the view that these materials were privileged under 26 U.S.C. §6103. In quashing subpoenas to the IRS and to the Cobb accountant and attorneys, the court ruled that these materials were privileged, but the court also stated that he had reviewed the tax returns for 1976, 1977 and 1978 and had found "nothing impeaching" in those returns.

a. The requested documents were not privileged.

In denying access to these important documents, the district court relied principally on the ground that 26 U.S.C. §6103 made them privileged and generally immune from disclosure. Section 6103 provides in pertinent part:

> (a) General rule.—Returns and return information shall be confidential, and except as authorized by this title—
>
> (1) no officer or employee of the United States,
>
> * * *
>
> shall disclose any return or return information obtained by him in any manner in connection with his service as such an officer or an employee or otherwise or under the provisions of this section.

It is important to distinguish at the outset between tax return information in the hands of the taxpayer or his agents and that same information in the hands of the government. Section 6103 does not create a privilege for such information when it is held by the taxpayer or his agents. At best, §6103 puts limits on governmental disclosure, but it does not create a general privilege—neither a privilege for the taxpayer nor a privilege for the government.

i) Cobb had no privilege in the requested documents.

Section 6103 makes tax return information "confidential", but it does not give the taxpayer a privilege. *St. Regis Paper Co. v. United States*, 368 U.S. 208 (1961), illustrated the distinction between privilege and confidentiality when it held that, although census data may be "confidential" within the government, it could be subpoenaed from the individual who originated or complied the data and reported the data to the government. *Id.* at 217-219. The court specifically analogized census data to tax returns, which it noted are subject to discovery from the taxpayer. The court contrasted §6103 with other statutes in which Congress has exempted designated materials from service of process and made them truly privileged. The court emphasized: "Ours is the duty to avoid a construction that would suppress otherwise competent evidence unless the statute, strictly construed, requires such a result". *Id.* at 218.

Income tax returns are almost routinely discoverable in civil litigation. The courts have held that §6103 does not make them privileged. *Heathman v. United States District Court*, 503 F.2d 1032, 1035 (9th Cir. 1974).

Section 6103 did not make Cobb's tax return information privileged, nor did this information have a privileged character when held by his accountant and attorneys. Federal courts do not recognize an accountant-client privilege. *Couch v. United States*, 409 U.S. 322, 335 (1973). Information conveyed to one's accountant for the preparation of tax returns is not privileged. This type of information is not privileged even when conveyed to an attorney, since the attorney is held to be performing accounting services. The nature of the service, not the title of the person performing it, is

dispositive. *United States v. Lawless*, 709 F.2d 485, 487 (7th Cir. 1983); *United States v. Davis*, 636 F.2d 1028, 1043 (5th Cir.), *cert. denied*, 454 U.S. 862 (1981).

The district court had no basis for concluding that Cobb had a privilege in the subpoenaed materials. The court's ruling was in direct conflict with *St. Regis Paper, supra*, and the other authorities that have declared that tax returns are non-privileged.

ii) The government had no privileges in the requested documents.

Since this information was not privileged in the hands of Cobb's agents and thus should have been discoverable, its production by the government personnel might seem redundant. But disclosure by the government was of more than academic interest to the Petitioners. The information held by the government might have been more complete, since Cobb and his agents were under no duty to retain copies of what they submitted to the IRS. Hence, Acosta had a right to disclosure in response to his subpoena directed to the IRS.

Section 6103 does forbid disclosure of tax return information by government employees except in accordance with enumerated statutory exceptions. Under a number of exceptions, government personnel may disclose in order to supply information to prosecutors who are seeking to convict a defendant. There is no comparable provision that supplies information to a defendant for use in his defense. The structure of §6103 makes the congressional intent obvious: the drafters wanted to preserve the privacy and confidentiality of a

taxpayer's return and associated documents, unless the government needed this return to convict someone. *See, United States v. Mangan*, 575 F.2d 32 (2d Cir.) *cert. denied*, 439 U.S. 931 (1978).

If §6103 means what it says and gives a prosecutor access to taxpayer return information, but deprives defense counsel of access to such documents, the statute is a denial of equal protection of law, a deprivation of due process, and an impediment to a fair trial and the right of confrontation.

> **[S]ince the Government which prosecutes an accused also has the duty to see that justice is done, it is unconscionable to allow it to undertake prosecution and then invoke its governmental privileges to deprive the accused of anything which might be material to his defense.**

United States v. Reynolds, 345 U.S. 1, 12 (1953); *see also, United States v. Nixon*, 418 U.S. 683, 711 (1974); *Rovario v. United States*, 353 U.S. 53, 60-61 (1957).

Section 6103 can be saved from invalidation only if this court enforces the "disclose-or-dismiss" doctrine. The seminal opinion on the consequences of the government's assertion of privilege in a criminal case is that of Judge Learned Hand in *United States v. Andolschek*, 142 F.2d 503 (2d Cir. 1944). The defendants, inspectors of the Alcohol Tax Unit, were charged with a conspiracy to violate internal revenue laws. During their employment by the Treasury Department, they had prepared official reports which narrated their conduct as inspectors. They sought to require the government

to provide them with these reports. The government, citing a Treasury regulation, urged that the reports were privileged, and the trial court agreed.

Judge Learned Hand opined:

> So far as they [the documents] directly touch the criminal dealings, the prosecution necessarily ends any confidential character the documents may possess; it must be conducted in the open, and will lay bare their subject matter. The government must choose; either it must leave the transactions in the obscurity from which a trial will draw them, or it must expose them fully. Nor does it seem to us possible to draw any line between documents whose contents bear directly upon the criminal transactions, and those which may be only indirectly relevant.

142 F.2d at 506. In *Andolschek*, the Treasury regulation was ambiguous. The court, in reversing the convictions of all defendants, concluded that the Treasury regulations should be construed to allow production. There is no comparable ambiguity in the statute *sub judice*. It is clear; it is unequivocal; and, if applied in a criminal prosecution, it is unconstitutional.

Six years after *Andolschek* was decided, Judge Learned Hand and the Second Circuit again looked at the problem. In *United States v. Coplon*, 185 F.2d 629 (2d Cir. 1950), government agents had installed wiretaps and had prepared logs of the discs on which recordings were made. The prosecutor excerpted conversations from these recordings that imperiled national security. The judge reviewed the original recordings and logs,

and held that Coplon should not have them. Again, the Second Circuit reversed; it discussed its earlier holding in *Andolschek* as follows:

> In *United States v. Andolschek* we held that, when the Government chose to prosecute an individual for crime, it was not free to deny him the right to meet the case made against him by introducing relevant documents, otherwise privileged. We said that the prosecution must decide whether the public prejudice of allowing the crime to go unpunished was greater than the disclosure of such "state secrets" as might be relevant to the defense. [sic] To that we adhere.

185 F.2d at 638 (footnote omitted).

Andolschek has been cited with approval by the Supreme Court. *e.g. Dennis v. United States*, 384 U.S. 855, 873 n.20 (1966); *Rovario v. United States*, *supra*, at 61 n.10, and has been extended to a number of contexts, *United States v. Lopez*, 328 F.Supp. 1077 (E.D.N.Y. 1971); *People v. Ramistella*, 306 N.Y. 379, 118 N.E.2d 566 (1954).

Once Cobb testified against the Petitioners, he could not legitimately refuse to disclose information pertinent to the Petitioners' defense. This information did not have a privileged character. Nor could the government refuse to disclose the same information. The district court's ruling allowed the government to withhold non-privileged information that would have aided Acosta's defense.

b. The requested documents were relevant and subject to defense subpoena.

Disclosure of Cobb's tax return information was litigated almost solely on the issue of privilege *vel non*. In quashing the subpoenas, the district court relied heavily on privilege, but also apparently rested on an alternate ground:

> It would appear that the subject matter of the subpoenas is covered by the attorney client privilege. Therefore, the subpoena will not be enforced. I have reviewed in camera Cobb's tax returns for the years 1976, 1977 and 1978, and find that there is nothing impeaching contained in the tax returns and therefore their admission would be, or any examination of them or their admission in evidence would be denied as not being relevant to the case under Rule 104 [sic].

Since Petitioners have not seen the requested materials, it is impossible to meet this assertion on its own grounds. Nonetheless, this alternate ruling was in error. A subpoena may be quashed if it seeks irrelevant material. *United States v. Nixon*, *supra*, at 699. But the court has no authority to quash on its independent judgment that the subpoenaed material is not helpful to the accused. Only defense counsel can make that judgment: "In our adversary system, it is enough for judges to judge. The determination of what may be useful to the defense can properly and effectively be made only by an advocate." *Dennis v. United States*, *supra*, at 875. See, also *Rovario v. United States*, *supra*,

at 64. As long as there may be "the seeds of innocence" in the requested material, it is material and relevant and producible under subpoena. *Gilmore v. United States*, 256 F.2d 565, 567 (5th Cir. 1958). Stated another way, there need only be a "likelihood" of relevance. *United States v. Nixon, supra*, at 700.

The court was not called upon to admit this material into evidence. Instead, Petitioners sought possession of this information so that they could urge on the court their theory of admissibility. The limited nature of a court's authority to quash, properly understood, explains why the accused may have a subpoena issue so long as he "avers facts which, if true, would be relevant to any issue in the case". *United States v. Hathcock*, 441 F.2d 197, 199 (5th Cir. 1971), *quoting Greenwell v. United States*, 317 F.2d 108, 110 (D.C. Cir. 1963); *accord, United States v. Moudy*, 462 F.2d 414, 417-8 (5th Cir. 1968) Petitioners constantly made such averments.

It must be remembered that the decision to quash is made for the benefit of the person subpoenaed, to relieve him from "unreasonable or oppressive" demands. *United States v. Nixon, supra*, at 698; Fed.R.Crim.P. 17(c). Cobb's representatives made no complaint that the requested material was so voluminous that they could bring it to court only with great difficulty. Cobb's only objection was his claim of privilege. With that claim correctly rejected, the district court would have had no stake in denying these materials to Acosta.

The dispositive issue in this dispute was privilege. That issue should not be obscured by the district court's erroneous characterization of the nature of the materials.

As the court correctly recognized in the Sunburn I trial, without even seeing the documents, Cobb's income tax returns were material and relevant.

c. The requested documents were producible under the Jencks Act.

Alternatively, these documents should have been produced under the Jencks Act no later than the close of Cobb's direct testimony. In denying production, the district court relied exclusively on its understanding of *United States v. Carrillo*, 561 F.2d 1125, 1128 (5th Cir. 1977). The district court read *Carrillo* to say that income tax returns are never, under any circumstances, a prior "statement" of the witness. The district court denied production without even examining the tax returns, even though Cobb had testified that he believed them to be truthful and accurate.

It is submitted that *Carrillo* did not set up a *per se* rule on tax returns and that, had it attemped to do so, its rule would be a patent misconstruction of the statutory language.

Carrillo's treatment of the issue is so terse that it is difficult to determine the exact basis of its holding. However, *Carrillo* did state that the Fifth Circuit was reluctant to upset a finding of fact on the Jencks Act character of requested material, unless that finding of fact was "clearly erroneous". *Id.* at 1128. Unless this statement is a *non sequitur*, the court was recognizing that the district court in *Carrillo* had examined the tax returns in question and had found them not to be "statements" as that term is used in the Jencks Act.

This ruling is much different from a holding that tax returns can never be Jencks Act material, as held by the district court in this case.

Nor would such a *per se* rule accord with the statutory definition of "statement" found in 18 U.S.C. §3500(e)(1) and Fed.R.Crim.P. 26.2(f)(1): "a written statement made by the witness and signed or otherwise adopted or approved by him." As long as the taxpayer reads and signs the return, it is a writing that has been signed and approved by the witness. For all that is known about the tax returns in *Carrillo*, they may have been signed before the forms were completed, or they may have been signed without any examination to determine their correctness, or they may have been signed only by the preparer.

In this case, Cobb admitted that the returns were true and correct. Without examining those returns, as the court was obliged to do, *United States v. Conroy*, 589 F.2d 1258, 1272-3, (5th Cir.), *cert. denied*, 444 U.C. 831 (1979), the district court determined that they were not Jencks Act material. The court's ruling that tax returns, by their nature, can never be Jencks Act material is a novel and incorrect *per se* rule that has no support in *Carrillo*.

d. The requested documents were *Brady* material.

The district court also ruled that the requested documents were not *Brady* material. This ruling was not founded on an *in camera* review of the specific documents. Instead, the district court read *Carillo* to

say that if material is not producible under the Jencks Act, it is equally non-producible under *Brady*. The court ruled on a question of law; it did not make an independent review of the materials for exculpatory evidence. The district court's error lies in its taking out of context a statement in *Palermo v. United States*, 360 U.S. 343, 351 (1959): "[S]tatements of a government witness made to an agent of the Government which cannot be produced under the terms of 18 U.S.C. §3500 cannot be produced at all."

The context of *Palermo* reveals the error of the district court's ruling. Palermo sought notes of an agent's interview with a key government witness for impeachment purposes. The lower courts had ruled that these notes were not, as required by §3500(e)(2), "a substantially verbatim recital" of the interview. Palermo argued that the Act, by regulating the production of substantially verbatim statements (and also signed statements) was not intended to regulate the production of statements that were neither substantially verbatim nor signed by the interviewee. The court rejected this argument, emphasizing the unfairness that would result in using fragmentary notes of third parties for impeachment purposes. The court did not believe that Congress intended to foster this unfairness by allowing the defense to use fragmentary reports for impeachment purposes. There was no claim and certainly no finding in *Palermo* that the fragmentary notes contained exculpatory materials.

Since *Palermo*, the Supreme Court has decided *Brady*, *Giglio v. United States*, 405 U.S. 150 (1972), and *United States v. Agurs*, 427 U.S. 97 (1976). These cases have established the defendant's constitutional right

to exculpatory evidence that the government has in its possession.

None of these cases has suggested that the contours of the *Brady* doctrine were congruent with the Jencks Act, nor has it been suggested that a compliance with the Jencks Act would serve as compliance with *Brady*. For example, it would be illogical and absurd to hold that, as long as the witness who had knowledge of the exculpatory evidence was not called at trial, there was no requirement to disclose the exculpatory evidence within that witness' knowledge. Yet, this would result from a theory that the Jencks Act and *Brady* doctrine covered the same ground, for, if a witness has not completed direct examination, there is no obligation under 18 U.S.C. §3500 to produce that person's statement.

In fact, the courts have recognized that the Jencks Act and *Brady* are independent bases of disclosure. *Chavis v. North Carolina*, 637 F.2d 213, 223 (4th Cir. 1980); *United States v. Bernard*, 607 F.2d 1257, 1263 (9th Cir. 1979). *See, also, United States v. Griggs*, 713 F.2d 672 (11th Cir. 1983); *United States v. Bensabat*, 568 F.2d 1226 (5th Cir.), *cert. denied*, 436 U.S. 927 (1978).

It is often argued that *Brady* does not require production of material that is also Jencks material prior to the time production is required by the Jencks Act, and Petitioners take no issue with that. However, it simply is not true that *Brady* material and Jencks Act material are synonymous:

> The *Brady* rule applies to the production of *evidence*, and not to "statements" or "reports" as does the Jencks Act, 18 U.S.C. §3500. Therefore, simply because the document containing the prosecutor's notes may not have been discoverable under the Jencks Act because it was not a "statement" or "report", it does not follow as North Carolina argues, that its failure to disclose the amended statement did not violate *Brady*.

Chavis v. North Carolina, 637 F.2d at 223 (emphasis in original) (footnote omitted).

The district court's ruling on *Brady* was in error, and the requested materials should have been produced. Without these materials, the Petitioners were limited to Cobb's fanciful statements about his tax liabilities and net worth. In a court of law, self-serving nature of these statements was no substitute for the actual documents. With these documents suppressed, Cobb had license to say whatever he wished about his tax situation.

3. The Court Erred In Refusing To Order That Counsel Be Furnished With Cobb's Statements And Refused To Examine Them In Camera.

Counsel for Acosta attempted to cross-examine the government's two principal witnesses, Abbey and Cobb, concerning the number of times they had been interviewed by federal agents, the circumstances of these interviews, the subjects about which they had been questioned, and the existence of notes and reports concerning the information they had provided.

Periodically, as testimony was developed establishing interviews concerning the subject of the witness' direct examinations, counsel moved that he be furnished with all notes, reports and memoranda of these interviews, or in the alternative, that they be examined by the court *in camera* to determine whether they constituted statements under the Jencks Act or exculpatory evidence within the holdings of *Brady* or *Giglio*.

4. The Petitioners Were Denied Their Right Of Confrontation Based Upon The Non-Production Of Said Tax Records.

Since the information sought by the Petitioners was relevant to their defense and to the impeachment of the government's chief witness, Bill Cobb, and since said records were producible under both the Jencks Act and as *Brady* information, and were not privileged, Petitioners would respectfully submit that they were denied their right of confrontation under the Sixth Amendment to the United States Constitution based upon said non-production. Petitioners seek this Honorable Court to accept jurisdiction in order to preserve said rights of confrontation.

CONCLUSION

For the above reasons and authorities cited herein, it is respectfully requested that this Honorable Court grant its Writ of Certiorari and enter its Order quashing the decision hereby sought to be reviewed and grant such other and further relief as seems right and appropriate to this Court.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing has been furnished by U.S. Mail to the Office of the Solicitor General, Department of Justice, Washington, D.C. 20530, this __ day of _____, 1986.

_____

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Appendix

IN THE UNITED STATES COURT OF APPEALS
FOR THE ELEVENTH CIRCUIT

NO. 83-3045

UNITED STATES OF AMERICA,

Plaintiff-Appellee,

versus

JOSE LUIS ACOSTA, DRADEN H. PADGETT, JR., JOSEPH ARON BROWN, WILLIAM E. BROWN, ODIS McMULLEN, THOMAS E. LEE, JOSEPH H. PADGETT and CHARLES DOUGLAS STRICKLAND,

Defendants-Appellants.

Appeals from the United States District Court for the Northern District of Florida

(August 12, 1985)

Before GODBOLD, Chief Judge, HATCHETT, Circuit Judge, and TUTTLE, Senior Circuit Judge.

PER CURIAM:

The only issue meriting discussion is whether the confrontation clause of the Constitution was violated by the court's refusal to order production of tax returns and other financial information concerning government witness Cobb and, if it was, whether this invalidates the conviction of appellant Acosta.

Acosta contends he was entitled to this material to impeach Cobbs' testimony that Acosta was the ringleader in the conspiracy. He sought the material under the Jencks Act, under *Brady v. Maryland*, 373 U.S. 83 (1963) and by subpoenaes to the witness, his accountants, and the Internal Revenue Service. The court examined tax returns for three years *in camera* and stated that it found "nothing impeaching in them."

Assuming that Acosta was entitled to the material, the denial of access to it was harmless error beyond reasonable doubt. A violation of the confrontation clause can be harmless beyond reasonable doubt. *Bowden v. Francis*, 733 F.2d 740, 757 (11th Cir. 1984); *Demps v. Wainwright*, 666 F.2d 224, 226 (5th Cir. 1982) (Unit B). At least seven witnesses other than Cobb gave testimony tending to show Acosta's role as leader of the conspiracy.[1]

[1]Thomas Abbey, 13 Rec 529-31; James Sellers, 16 Rec. 1383-84; 1406; Carlton Reeves, 16 Rec. 1489, 1505-06, 1548; James Lee Bailey, 18 Rec. 1965, 1980; Vernon Mattson, 18 Rec. 2162; Alex Guriak, Jr., 18 Rec. 2203; Alfred Vadney, 19 Rec. 2337.

All other issues raised by all appellants have been considered. None has any merit.[2]

The convictions of all defendants are AFFIRMED.

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[2]We have accepted and considered fully the brief of Acosta, and all points raised by Acosta, despite the hyperbolic, overblown and discourteous tone of his brief. An advocate can firmly identify errors and engage in hard-hitting advocacy without resorting to insults. Counsel, possibly unaware of the standards expected of counsel in this court, accuses the district court and the government, among other things of:

- —the court of "systematically depriving" Acosta of a fair trial.
- —the court of "creat[ing] new law at every turn" in order to deny proper cross-examination by Acosta.
- —the court of "allow[ing] the government to lie to the jury."
- —the government of refusing to seek immunity for a witness because of "a cynical desire to deny Acosta a witness and thereby skew the fact-finding process."
- —the government of telling a witness to go into hiding or aiding or abetting the witness in her effort to hide [neither assertion is supported by the record].

[FILED JAN 08 1986]

IN THE UNITED STATES COURT OF APPEALS
FOR THE ELEVENTH CIRCUIT

NO. 83-3045

UNITED STATES OF AMERICA,

Plaintiff-Appellee,

versus

JOSE LUIS ACOSTA, DRADEN H. PADGETT, JR., JOSEPH ARON BROWN, WILLIAM E. BROWN, ODIS McMULLEN, THOMAS E. LEE, JOSEPH H. PADGETT and CHARLES DOUGLAS STRICKLAND,

Defendants-Appellants.

Appeals from the United States District Court for the Northern District of Florida

(January 8, 1986)
ON PETITIONS FOR REHEARING

Before GODBOLD, Chief Judge, HATCHETT, Circuit Judge, and TUTTLE, Senior Circuit Judge.

PER CURIAM:

By petitions for rehearing appellants Charles Douglas Strickland and Draden Padgett, Jr. have called to our attention that in brief and at oral argument the United States conceded that there was insufficient evidence to

support their convictions under counts 24 and 25. We can find no such concession with respect to appellant Thomas E. Lee, but the factual situation for him is consistent with that of Strickland and Padgett, Jr.

The convictions of these three appellants on counts 24 and 25 are, therefore, VACATED.

By petition for rehearing appellant Jose Luis Acosta has called our attention that in brief and oral argument the United States has stated that it does not oppose vacation of his convictions and sentences on counts 2 and 3 as long as his conviction on count 1 is upheld. *See Jeffers v. U.S.*, 432 U.S. 137 (1977) and *U.S. v. Graziano*, 70 F.2d 691, 699 (11th Cir. 1983). Acosta's conviction on count 1 having been upheld, his convictions and sentences on counts 2 and 3 are VACATED.

Except as above set out, the petitions for rehearing of Jose Luis Acosta, Draden H. Padgett, Jr., Joseph Aron Brown, Odis McMullen, Thomas E. Lee, and Charles Douglas Strickland are DENIED.

GRANTED in part and DENIED in part.